

This Opinion is Not a  
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Alderwood Surgical Center*

Serial No. 88427822

Bret W. Albertson of Vendevr Law for Alderwood Surgical Center.

Karl A. Wert, Trademark Examining Attorney, Law Office 120,  
David Miller, Managing Attorney.

Before Bergsman, Greenbaum, and Larkin,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Alderwood Surgical Center (“Applicant”) seeks registration on the Principal Register of the standard character mark ZOMBIE BBL (BBL disclaimed) for “Surgery; Cosmetic surgery services; Cosmetic and plastic surgery; Plastic surgery; Plastic surgery services” in International Class 44.<sup>1</sup>

<sup>1</sup> Application Serial No. 88427822 was filed on May 13, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claimed first use of the mark and first use of the mark in commerce at least as early as October 31, 2018. The letters BBL in the mark abbreviate “Brazilian Butt Lift,” a surgical procedure. July 24, 2019 Office Action at TSDR 1, 7-20.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the standard character marks ZOMBIE BRACES (BRACES disclaimed) and ZOMBIE TEETH (TEETH disclaimed), both registered on the Principal Register for "dentist services" in International Class 44,<sup>2</sup> as to be likely, when used in connection with the services identified in the application, to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration, which was denied. Applicant and the Examining Attorney have filed briefs.<sup>3</sup> We affirm the refusal to register.

#### **I. Record on Appeal and Evidentiary Issue<sup>4</sup>**

The record on appeal includes Applicant's specimen of use and the following materials:

- USPTO electronic records regarding the cited registrations;<sup>5</sup>

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<sup>2</sup> Registration No. 4895227 of ZOMBIE BRACES issued on February 2, 2016 and Registration No. 4858324 of ZOMBIE TEETH issued on November 24, 2015. They are owned by the same entity (the "Registrant"). Both registrations cover additional services that were not cited by the Examining Attorney in support of the refusal to register.

<sup>3</sup> Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant's brief appears at 6 TTABVUE. The Examining Attorney's brief appears at 8 TTABVUE.

<sup>4</sup> Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO").

<sup>5</sup> July 24, 2019 Office Action at TSDR 2-6.

- Internet webpages regarding the meaning of the term “BBL” in Applicant’s mark;<sup>6</sup>
- Internet webpages of various providers of dental and surgical services;<sup>7</sup>
- Pages from the Registrant’s website,<sup>8</sup> and Applicant’s website;<sup>9</sup>
- An article regarding the training and practices of physicians and dentists;<sup>10</sup>
- USPTO electronic records regarding third-party registrations of marks for the same or similar services of Applicant and Registrant;<sup>11</sup>
- Webpages from webmd.com regarding the professional training and practices of physicians and dentists;<sup>12</sup> and
- Webpages containing statistics pertaining to the public’s use of dentist services, and cosmetic and plastic surgery services, the nature and cost of such services, and the training of health care professionals in those fields.<sup>13</sup>

Applicant attached many of these materials to its appeal brief, 6 TTABVUE 10-76, and then cited them in the brief. *Id.* at 7-9. The Board strongly discourages this practice. “Parties to Board cases occasionally seem to be under the impression that attaching previously-filed evidence to a brief and citing to the attachments, rather

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<sup>6</sup> *Id.* at TSDR 7-20.

<sup>7</sup> *Id.* at TSDR 21-43; July 30, 2020 Final Office Action at TSDR 2-76; February 16, 2021 Denial of Request for Reconsideration at TSDR 2-33.

<sup>8</sup> December 6, 2019 Response to Office Action at TSDR 6-8, 14-15.

<sup>9</sup> *Id.* at TSDR 9-13, 16-25.

<sup>10</sup> *Id.* at 26-28.

<sup>11</sup> January 8, 2020 Office Action at TSDR 2-21.

<sup>12</sup> July 7, 2020 Response to Office Action at TSDR 3-6.

<sup>13</sup> *Id.* at TSDR 2-68.

than to the original submission is a courtesy or convenience to the Board. It is neither.” *In re Michalko*, 110 USPQ2d 1949, 1950 (TTAB 2014). As the Board explained in *Michalko*, “[w]hen considering a case for final disposition, the entire record is available to the panel,” and “[b]ecause we must determine whether attachments to briefs are properly of record, citation to the attachment requires examination of the attachment and then an attempt to locate the same evidence in the record developed during the prosecution of the application,” which requires “more time and effort than would have been necessary if citations directly to the prosecution history were provided.” *Id.* at 1950-51.

The Examining Attorney argues that Applicant also attached to its brief “new evidence to overcome the refusal to register” in the form of USPTO electronic records regarding six “pairs” of third-party registrations of similar marks that each cover one of the services identified in the application and the cited registrations, but are owned by different entities. 8 TTABVUE 4 (citing 6 TTABVUE 77-89).<sup>14</sup> The Examining Attorney objects to the third-party registrations under Trademark Rule 2.142(d), 37 C.F.R. § 2.142(b), which provides that

The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed. After an appeal is filed, if the appellant or the examiner desires to introduce additional evidence,

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<sup>14</sup> Applicant listed these registrations in its January 29, 2021 Request for Reconsideration at TSDR 2-3. The Examining Attorney states that he advised Applicant “of the procedure for making third party registrations of record in the February 16, 2021 letter” denying the Request for Reconsideration. 8 TTABVUE 4 n.2 (citing February 16, 2021 Denial of Request for Reconsideration at TSDR 1). Applicant did not follow this procedure.

the appellant or the examiner may request the Board to suspend the appeal and to remand the application for further examination.

“Evidence filed in an ex parte proceeding must be filed prior to the filing of the appeal, not afterwards.” *In re ADCO Indus. — Techs., L.P.*, 2020 USPQ2d 53786, at \*2 (TTAB 2020) (citing Trademark Rule 2.142(d)). We sustain the Examining Attorney’s objections to the third-party registrations attached to Applicant’s brief, and have given them, and Applicant’s related arguments under the heading “USPTO Previous Decisions,” 6 TTABVUE 9, no consideration in our decision.

## **II. Analysis of Section 2(d) Refusal**

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent or Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” Our determination of the likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

“Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because the

‘fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.’” *In re Embiid*, 2021 USPQ2d 577, at \*10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). Applicant does not address the first *DuPont* factor in its brief, focusing instead on the second, third, and fourth factors. 6 TTABVUE 6-9.

#### **A. Similarity or Dissimilarity of the Marks**

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *Embiid*, 2021 USPQ2d 577, at \*11 (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsarding Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). Applicant stated during prosecution that it “does not dispute that the ‘Zombie’ mark being applied for is identical to Registrant’s,”<sup>15</sup> and, as noted above, Applicant does not address the first *DuPont* on appeal, effectively conceding that the marks are similar. *See In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1740 (TTAB 2016) (applicant’s failure to address second and third *DuPont* factors in its brief deemed an apparent concession on those factors). Accordingly, “we offer only a brief explanation of our conclusion” under the first *DuPont* factor. *Id.*

Applicant’s mark ZOMBIE BBL, and the cited marks ZOMBIE TEETH and ZOMBIE BRACES, are structurally identical because they consist of the unusual and memorable word ZOMBIE followed by words that are generic for, or merely

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<sup>15</sup> July 7, 2020 Response to Office Action at TSDR 69.

descriptive of, the respective services, and have been disclaimed. It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion determinations. *See, e. g., In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)). Consumers of the services with which the marks are used are likely to focus on the identical and distinctive lead word ZOMBIE in identifying the source of the services. *See, e.g., id.* (the marks DETROIT ATHLETIC CO. and DETROIT ATHLETIC CLUB “reveal an identical structure and a similar appearance, sound, connotation, and commercial impression” and these “similarities go a long way toward causing confusion among consumers”); *Palm Bay Imps.*, 73 USPQ2d at 1692; *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). We find that Applicant’s mark is quite similar to the marks in both of the cited registrations in appearance, sound, and connotation and commercial impression, and the first *DuPont* factor thus supports a finding of a likelihood of confusion.

**B. Similarity or Dissimilarity of the Services and Channels of Trade**

The second *DuPont* factor “considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567), while the third *DuPont* factor “considers [t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *Id.* at 1052 (quoting *DuPont*, 177 USPQ at 567).

### 1. Similarity or Dissimilarity of the Services

The services identified in both of the cited registrations are “dentist services,” while the services identified in Applicant’s application are “Surgery; Cosmetic surgery services; Cosmetic and plastic surgery; Plastic surgery; Plastic surgery services.” “The Examining Attorney need not prove, and we need not find, similarity as to each [service] listed the description” in the application. *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at \*3-4 (TTAB 2020). “It is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of” services in the application. *Id.*, at \*4 (quoting *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) and citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)).

The involved “services need not be identical or even competitive to find a likelihood of confusion.” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at \*4 (TTAB 2019) (citing *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000)). “They need only be ‘related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the services] emanate from the same source.’” *Id.* (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation omitted)).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant [services] are used together or used by the same purchasers; advertisements showing that the relevant [services] are advertised together or sold by the same



manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant's [services] and the [services] listed in the cited registration[s].

*Embiid*, 2021 USPQ2d 577, at \*22-23 (quoting *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at \*5 (TTAB 2020)).

“We begin with the identifications of . . . services in the registration[s] and application under consideration.” *Country Oven*, 2019 USPQ2d 443903, at \*5. The registrations cover services broadly identified as “dentist services” and the identification of services in the application begins with services broadly identified as “surgery.” Where, as here, “the identification of services is broad, the Board ‘presume[s] that the services encompass all services of the type identified.’” *Id.*, at \*4.

The Examining Attorney argues that the identification of “dentist services” in the cited registrations “overlaps the Applicant’s ‘surgery’ services.” 8 TTABVUE 7. Applicant does not address this portion of its identification, but instead focuses on the relatedness of its “cosmetic and plastic surgery and the Registrant’s dental services,” 6 TTABVUE 7, arguing that there is “a de minimis overlap” of those services. *Id.* at 8. As discussed above, however, the Examining Attorney need not show that “dentist services” are similar to “cosmetic and plastic surgery” if “dentist services” encompass “surgery” because dentists may perform “surgery” in the course of rendering their services.

That dentists may perform “surgery” seems self-evident from the fact that dental school graduates commonly receive the degree of “Doctor of Dental Surgery”

(“DDS”),<sup>16</sup> and the record confirms that “surgery” is a part of “dentist services.” Applicant acknowledges that “[d]ental services encompass a wide range of services and specialties related to the care of teeth, gums, and mouth,” 6 TTABVUE 7, including the dental “specialty called ‘oral and maxillofacial surgery,’” *id.*, in which “[o]ral and maxillofacial surgeons receive additional training after dental school,” and Applicant states that the “number of maxillofacial surgeries performed **as part of dental services** is approximately 17 million, **roughly 3% of all dental services.**” *Id.* at 7-8 (emphasis added).<sup>17</sup> Applicant also made of record pages from WebMD discussing, under the heading “Oral and Maxillofacial Surgeon,” the “types of surgeries an oral surgeon may perform,” including “simple tooth extractions, complex extractions involving removal of soft tissue or overlying bone or remaining roots, impacted teeth (especially wisdom teeth) removal, soft tissue biopsies, removal of tumors in the oral cavity implant positioning, complex jaw realignment surgeries involving facial or bite discrepancies, fractured cheek or jaw bone repair and soft tissue (cleft palate or lip) repair.”<sup>18</sup>

Internet evidence made of record by both Applicant and the Examining Attorney confirms that dentists perform various types of surgery in the course of rendering their services.<sup>19</sup> Applicant made of record pages from the Registrant’s website that

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<sup>16</sup> July 7, 2020 Response to Office Action at TSDR 3.

<sup>17</sup> *Id.* at TSDR 8-14.

<sup>18</sup> *Id.* at TSDR 4.

<sup>19</sup> Applicant argues that “the use of ‘Internet evidence’ by the Examining Attorney to determine relatedness was given undue consideration” because “[u]nder the standard stated in *In re St. Helena Hosp.* [774 F.3d 747, 113 USPQ2d 1082 (Fed. Cir. 2014)] ‘[a]dvertising on the Internet is ubiquitous and proves little, if anything, about the likelihood that consumers

list its numerous services, including “Oral Surgery & Dental Implants.”<sup>20</sup> Applicant also made of record an article entitled “Dentist vs. Doctor,”<sup>21</sup> which states that “[d]entists are doctors who specialize in oral health,” and that “[s]ome dentists perform surgery on the teeth, bones and soft tissue of the mouth.”<sup>22</sup> The article also notes that oral surgery is a specialty area within dentistry “which can require four to six years of additional study” beyond dental school.<sup>23</sup> Finally, Applicant made of record pie charts showing the percentages of various dentist services in 1999 and 2009 out of all procedures.<sup>24</sup> “Oral surgery” was listed as one such procedure, and the text accompanying the charts discussed the number of “surgical” procedures performed by dentists with respect to various demographic groups.

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will confuse similar marks used in such goods and services.” 6 TTABVUE 7 (quoting *St. Helena Hosp.*, 113 USPQ2d at 1087). Applicant’s citation of *St. Helena Hosp.* is misleading at best. The quoted language in the decision was preceded by the court’s statement that in refusing registration of the applicant’s mark, the USPTO went “too far . . . in claiming that because both St. Helena’s services and the registrant’s goods are promoted through websites, the channels of trade are similar.” *St. Helena Hosp.*, 113 USPQ2d at 1087. The Board has long recognized the principle that “the mere fact that goods and services may both be advertised and offered through the Internet is not a sufficient basis to find that they are sold through the same channels of trade,” *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1743 (TTAB 2014), but the Internet evidence here is offered to show that the involved services may be provided under the same mark. When used for that purpose, Internet evidence is a recognized source of proof of relatedness. *See, e.g., In re Integrated Embedded*, 120 USPQ2d 1504, 1514-15 (TTAB 2016) (websites made of record by examining attorney “demonstrate[d] that services of the type offered by both Applicant . . . and Registrant are marketed and sold together online under the same marks” and “[s]uch evidence is sufficient to find that the services at issue are related.”).

<sup>20</sup> December 6, 2019 Response to Office Action at TSDR 15.

<sup>21</sup> *Id.* at TSDR 26.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at TSDR 27.

<sup>24</sup> July 7, 2020 Response to Office Action at TSDR 8-14.

The Examining Attorney made of record pages from the websites of various medical professionals who offer “surgery” as part of their “dentist services.” The website of Atlanta Oral & Facial Surgery offers a variety of “Dental Treatments,” including “Wisdom Teeth,” “Dental Implants,” and “Bone Grafting,” as well as what it describes as “Non[-]Surgical Services.”<sup>25</sup> The website of Alamo Maxillofacial Surgical Associates lists multiple dentists holding the DDS degree who offer a variety of oral surgical procedures, including dental implants, wisdom teeth, bone grafting, and tooth extraction.<sup>26</sup> The website of McLain Surgical Arts offers “Oral Maxillofacial Surgery,” including “Dental Surgery” involving wisdom teeth and dental implants.<sup>27</sup> The website of NorthWest Valley Oral Maxillofacial & Facial Cosmetic Surgery, PC offers dental implants and wisdom teeth removal.<sup>28</sup>

The Examining Attorney also made of record six use-based, third-party registrations of marks for both “dentist services” (or its equivalent “dentistry services”), and “oral surgery and dental implant services,”<sup>29</sup> “oral surgery and dental implant services and dental services, namely, performing restorative and cosmetic procedures,”<sup>30</sup> or “oral surgery services.”<sup>31</sup>

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<sup>25</sup> July 24, 2019 Office Action at TSDR 42.

<sup>26</sup> July 30, 2020 Final Office Action at TSDR 66-76.

<sup>27</sup> February 16, 2021 Denial of Request for Reconsideration at TSDR 2-3

<sup>28</sup> *Id.* at TSDR 19-27.

<sup>29</sup> January 8, 2020 Office Action at TSDR 2-4 (Registration No. 3893883); 8-9 (Registration No. 4465697), 16-18 (Registration No. 5507032).

<sup>30</sup> *Id.* at TSDR 5-7 (Registration No. 4170480).

<sup>31</sup> *Id.* at TSDR 10-12 (Registration No. 4830000), 19-21 (Registration No. 5742891).

The record as a whole shows that dentists perform “surgery” and that “surgery” services are thus encompassed within “dentist services.” “Applicant’s services . . . thus are subsumed by Registrant’s services, and [are] legally identical thereto.” *Integrated Embedded*, 120 USPQ2d at 1514.

Although the legal identity of the services in part is sufficient to show that the second *DuPont* factor supports a finding of a likelihood of confusion, the record also shows that “dentist services” and “cosmetic surgery services” may be offered by the same providers under the same marks. Applicant concedes a “limited overlap between the Applicant’s cosmetic and plastic surgery services and the Registrant’s dental services” in the field of maxillofacial surgery, 6 TTABVUE 7,<sup>32</sup> and the Examining

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<sup>32</sup> As noted above, Applicant claims that in 1999 and 2009, procedures described as “Oral Surgery” accounted for “roughly 3% of all dental services” or approximately 17 million procedures, while “the number of maxillofacial surgeries performed by plastic and cosmetic surgeons” was “approximately 204,000 annually.” 6 TTABVUE 7-8. Applicant cites *Elec. Design & Sales, Inc. v. Elec. Data Sys. Corp.*, 954 F.2d 713, 21 USPQ2d 1388 (Fed. Cir. 1992), for the proposition that “any overlap in customers is too small to be significant much less dispositive.” *Id.* at 8 (quoting *Elec. Design & Sales*, 21 USPQ2d at 1392). Applicant’s reliance on *Elec. Design & Sales* is misplaced. In that case, the Board had found that computer services, and power suppliers and battery chargers, were related because they would be encountered by some of the same large corporations. The Federal Circuit reversed the Board’s likelihood of confusion conclusion based on that finding because there was no evidence that the relevant human purchasers within those corporations who bought computer services, and power suppliers and battery chargers, were the same. As the court put it, the record did “not establish that the actual and potential purchasers from each party would be the same, due to specialization among their corporate customers’ departments.” *Elec. Design & Sales*, 21 USPQ2d at 1391. The court’s statement that “any overlap in customers is too small to be significant much less dispositive,” *id.* at 1392, was made against the backdrop of the court’s holding that the Board erred because it “only considered corporate customers as a whole rather than determining the ‘relevant persons’ within,” such that the number of opposer’s customers who came into contact with applicant’s goods “would involve at most only a *de minimis* number of sophisticated purchasers.” *Id.* Here, the “relevant persons” who purchase dentist services, and cosmetic surgery services, are natural persons in need of health care. The record shows that they may encounter both sets of services sold under the same mark.

Attorney made of record webpages of a number of entities that offer both dentist services and cosmetic surgery services under the same marks.

In addition to the four websites discussed above, other websites in the record confirm that dentist services and cosmetic surgery services may emanate from the same source.

- The website of Greater Charlotte Oral and Facial Surgery offers “several oral and cosmetic surgery procedures,” including wisdom teeth removal, dental implants, general extractions, bone grafting, multiple teeth replacement, facelift surgery, and laser facial skin resurfacing services.<sup>33</sup>
- The website of Capital Center for Oral and Maxillofacial Surgery and for Cosmetic Surgery, which is a practice of three dentists holding the DDS degree, offers cosmetic surgery, including tummy tucks, facelifts, and Brazilian butt lifts, and oral dental surgery, including bone grafting and dental implants.<sup>34</sup>
- The website of Deme at demecosmetic.com, which describes itself as a “dental • medical collaborative,” offers dental care as well as plastic surgery.<sup>35</sup>
- The website of Hedden & Gunn Plastic Surgery offers “Cosmetic Surgery, Dentistry and More” at the Greystone Cosmetic Center.”<sup>36</sup>

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<sup>33</sup> July 24, 2019 Office Action at TSDR 21-28.

<sup>34</sup> *Id.* at TSDR 29-34; July 30, 2020 Final Office Action at TSDR 24-51.

<sup>35</sup> July 24, 2019 Office Action at TSDR 43.

<sup>36</sup> July 30, 2020 Final Office Action at TSDR 2-15.

- The website of Premiere Surgical Arts, which describes oral and maxillofacial surgery as “the bridge between medicine and dentistry,” offers dental implants, wisdom teeth removal, bone grafting, and cosmetic surgery.<sup>37</sup>
- The website of Cosmetic & Laser Dental Studio offers dental services and cosmetic surgery.<sup>38</sup>

In addition, each of the third-party registrations in the record covers “dentist services” (or its equivalent “dentistry services”) and some form of cosmetic surgery.<sup>39</sup>

The involved services are identical in part and otherwise related. The second *DuPont* factor supports a finding of a likelihood of confusion.

## **2. Similarity or Dissimilarity of the Channels of Trade**

“Because the services are identical [in part], we must presume that the channels of trade and classes of purchasers are the same.” *In re Am. Cruise Lines, Inc.*, 128 USPQ2d 1157, 1158 (TTAB 2018) (citing *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012)). *See also Primrose Retirement Cmty., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016) (“Given the identity of the services, at least in part, and the lack of restrictions on trade channels and classes of consumers in the recitations of services, we presume that these services travel through the same channels of trade . . . .”). With respect to services in the application other than “surgery,” the record shows that “dentist services” and

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<sup>37</sup> *Id.* at TSDR 16-23.

<sup>38</sup> *Id.* at 52-58.

<sup>39</sup> January 8, 2020 Office Action at TSDR 2-21.

“cosmetic surgery” may be delivered through health care practices that offer both sets of services to persons in need of these particular forms of treatment. The third *DuPont* factor supports a finding of a likelihood of confusion.

### **C. Purchase Conditions and Purchaser Care**

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Applicant argues that “[h]ighly trained specialists in very controlled environments provide” the involved services, 6 TTABVue 8, and that confusion is unlikely because

In order for a consumer to purchase these services they must consult with a medical professional. In making the determination that a likelihood of confusions exists the Examiner failed to identify the involvement of these medical professionals in the purchasing process. The medical professional decides the course of treatment and makes recommendations for products or services. The consumer will not and cannot purchase services without approval from the medical professional. This means that the relevant purchaser is not just a consumer seeking the service but also the medical professional that the patient is conferring with for any service. This also means that the medical professional is an “*influencer*” on purchasing decisions by the patient.

*Id.*

Applicant further argues that

In determining the likelihood of confusion the Examiner failed to account for the sophistication of the purchaser. The pricing of the dental services and cosmetic and plastic surgery services vary greatly. Dental services can range from \$20 to \$80,000 depending on the type of service . . . Cosmetic and plastic surgery procedures start at around \$6,500 and go up and [are] provided by cosmetic and plastic



surgeons. The price of these services indicates that these are not impulse purchases but require a purchaser to engage in careful consideration. In addition, all of the services require consultation with a professional in these very specialized areas. To select a professional a person seeking these services goes [sic] conducts extensive research.

*Id.* at 9.

The Examining Attorney effectively concedes some degree of greater purchaser care in purchasing dental and surgery services by arguing that “the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion.” 8 TTABVUE 13. He concludes, however, that “the marks have a high degree of similarity and the services are highly related,” and that “[c]onsumers, regardless of their sophistication, would therefore be likely to mistake the sources of the parties’ overlapping services.” *Id.*

We find that purchasers of dentist services and surgery services, including cosmetic surgery services, would not be uniformly sophisticated, but would likely exercise more than ordinary care in purchasing the services. The record shows that dentist services, and surgery services, including cosmetic surgery services, are offered to “people in all walks of life, at all levels of education and income.” *Primrose Retirement Cmtys.*, 122 USPQ2d at 1039. “We must therefore presume that [the] services are offered to both sophisticated and unsophisticated consumers,” and “[a]ccordingly, the applicable standard of care for the likelihood of confusion analysis is that of the least sophisticated consumer.” *Id.* (citing *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014)).

At the same time, however, the facts that the services all involve the consumer's personal health, well-being, and appearance, and that some of the services may be quite costly, suggest that even the least sophisticated potential purchaser will exercise more than ordinary care in selecting the source of the services. *See id.* ("even in the case of the least sophisticated purchaser, a decision as important as choosing a senior living community will be made with some thought and research, even when made hastily."). We find that the fourth *DuPont* factor supports a finding that confusion is not likely.

#### **D. Balancing the *DuPont* Factors**

The first, second, and third *DuPont* factors support a finding of a likelihood of confusion because the marks are quite similar, and the services, channels of trade, and classes of consumers are identical in part and otherwise similar. The fourth *DuPont* factor supports a contrary finding because of the nature of the involved services and the fact that some may be quite costly. But even assuming "that purchases of Applicant's and Registrant's services would involve a deliberative decision, this does not mean that the purchasers are immune from confusion as to the origin of the respective services, especially where, as here, the services are legally identical in part and otherwise related, and offered under" similar marks. *Integrated Embedded*, 120 USPQ2d at 1515-16. "In this case, the legal identity or similarity of the services and similarity of the marks outweigh any sophisticated purchasing decision." *Id.* at 1516 (citing *HRL Assocs., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990)). Applicant's

ZOMBIE BBL mark could readily be viewed as denoting an extension of the Registrant's "dentist services" offered under the ZOMBIE TEETH and ZOMBIE BRACES mark into "surgery" or "cosmetic surgery" of the sort that the record shows often results in both sets of services being offered by the same health care provider under the same mark. *See, e.g., Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at \*7 (TTAB 2019) ("ROAD WARRIOR look, sounds, and conveys the impression of being a line extension of WARRIOR."). "Even those purchasers who are fully aware of the specific differences between the marks may well believe, because of the similarities between them, that the two marks are simply variants of one another, used by a single [provider] to identify and distinguish companion lines of [services]." *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985). We "find that Applicant's mark, as used in association with the ["surgery" and "cosmetic surgery"] services identified in the application, is likely to cause confusion with the registered mark[s] used in connection with the ["dentist] services[]"] recited in the registration[s]." *Integrated Embedded*, 120 USPQ2d at 1516.

**Decision:** The refusal to register is affirmed.